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In the Supreme Court of the United States

October Term, 1981

ALPHONSO RANDOLPH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOR THE FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner was denied due process of law where the State waited 43 months to file its petition to revoke his probation, and where said petition was filed subsequent to the expiration of said term of probation.

PARTIES

All parties are named in the caption.

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOR THE FIRST JUDICIAL DISTRICT

Alphonso Randolph, Petitioner, respectfully asks that a writ of certiorari issue to review the judgment of the Appellate Court of the State of Illinois, First Judicial District, in *People of the State of Illinois, Plaintiff-Appellee* v. *Alphonso Randolph, Defendant-Appellant,* No. 80-240, which affirmed the finding of violation of probation and subsequent three-year penitentiary sentence on the original theft conviction.

REPORTED DECISIONS

The opinion of the Appellate Court, *People* v. *Randolph*, appears at 98 Ill. App. 3d 696, 424 N.E.2d 893 (1981). A copy of the opinion appears as an appendix to this petition. The order of the Supreme Court of Illinois denying leave to appeal is not yet reported. A copy of that order likewise appears in the appendix to this petition.

JURISDICTION

1. The Appellate Court of Illinois affirmed petitioner's convictions by decision filed July 28, 1981. Petitioner then sought leave to appeal by petition to the Supreme Court of Illinois filed on October 15, 1981. The Illinois Supreme Court denied leave to appeal by order dated January 12, 1982. On February 17, 1982, Justice Simon of the Illinois Supreme Court entered an order staying issuance of the mandate of that court pending resolution of this petition for writ of certiorari. No extension of time within which to petition for certiorari has been sought or allowed.

2. Jurisdiction lies to this court under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Sec. 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

On June 18, 1975, Alphonso Randolph pleaded guilty to an information numbered 75 I 1645 charging him with theft, and pursuant thereto was sentenced to four years probation, by his Honor Judge Paul F. Gerrity.

Six months later, on December 31, 1975 while patrolling an area near Deel Ford, in Posen, Illinois, Sergeant Randall E. Wolfe observed an automobile stop and let an unknown individual out, then continued on in an easterly direction. As he followed the moving vehicle, he passed Deel Ford's parking lot, where he observed, from a distance of about ten feet, the individual whom he believed to be the same one that had gotten out of said moving vehicle, alighting from a black Ford truck parked in Deel's lot.

Admittedly his attention was focused on the moving vehicle, not said individual and he continued in pursuit without stopping, until he overtook said vehicle, and placed the driver under arrest. Upon completion of said arrest, he returned to his squad and radioed what he believed to be a description of the unknown individual he had observed in Deel Ford's parking lot. This description consisted of the following: male, black, stocky build. After putting out the radio message he returned to the Deel Ford lot and made an inspection of the aforementioned black Ford truck. As a result of his inspection he recovered a lock pulley, and screwdriver which he placed on the front seat of his squad car, without making any identifying marks thereon, at this, or any other time. Shortly thereafter in response to a dispatch indicating that a subject matching his earlier radio description had been apprehended by a Dixmoor Police officer, named Hollaway, at a Texaco gas station in the near vicinity, he went to said Texaco gas station where he met with officer Joseph Underwood, a security guard for Deel Ford, Officer Hollaway of Dixmoor Police Department, and the subject in custody, Alphonso Randolph. Upon his arrival at the Texaco station he identified Alphonso Randolph as being the unknown individual whom he had seen earlier in Deel Ford's parking lot, taking him to the Posen Police Department.

On the same date, Joseph Underwood was working as a security guard for Deel Ford. At approximately 2:45 a.m., while he was at the north end of Deel's 3½ acre lot, he heard officer Wolfe's radio broadcast regarding a subject in a black Ford pick-up truck. As he could not see the truck in question from his vantage point, he went to the south end of the lot, where the truck was parked. When he was approximately 200-300 feet away from the black

truck he observed an unknown individual running away from him. In order to pursue this subject Underwood went back to his auto, thereafter heading in the direction of the Texaco gas station. Upon his arrival at said Texaco station Alphonso Randolph was in the custody of Officer Hollaway.

As a result of his arrest of December 31, 1975, the Petitioner's said cause was continued to April 27, 1976. On April 27, 1976, pursuant to the charge of attempt theft, Alphonso Randolph again appeared in court, before his Honor Judge Dwight McKay, without counsel. On this date the information numbered 75-I-6-137 file was present, the state made mention of a petition for violation of Mr. Randolph's probation; however, the "memorandum of orders" (half sheet) of this date does not indicate the same was ever filed with the clerk of the court, nor was a warrant or summons issued or a bond set to secure Mr. Randolph's appearance, or to toll his probationary period. In fact the charge of attempt theft was merely continued to a future date.

On February 16, 1978, Alphonso Randolph was arrested at approximately 7:00 p.m., while a passenger in a parked vehicle, in front of 15019 Artesian, Markham, Illinois. At the time of his arrest, he was not in violation of any city, state, or federal law. This arrest was made by Douglas Newton, an officer of the Harvey Police Department. Earlier that date, while off duty, Officer Newton observed four individuals near a garage behind 15019 Artesian, Markham, Illinois loading automobile parts into a Budget Rental van. As Officer Newton approached the garage to get a better look, the individuals went inside, closing the door behind them. Based upon this information Officer Newton obtained a warrant to search the aforesaid garage.

Armed with the warrant Officer Newton returned to the garage, conducted a search therein, determined that the vehicles contained therein had been stolen from Chicago, Illinois and were the property of Alvin Edwards, and Arthur James. Later that same evening, Officer Newton arrested Bill Bruton, owner of the premises at 15019 Artesian, Markham, Illinois, and Greg Davis, driver of the Budget rental van. After said arrests, the auto parts found in the Budget Rental van, were not matched to the two vehicles found earlier in the aforesaid garage. Alphonso Randolph's arrest occurred approximately four hours after the arrest of Bruton and Davis.

On November 13, 1979 the State filed a document entitled "Supplemental Petition for Violation of Probation" in the case of People of the State of Illinois v. Alphonso Randolph, numbered 75 I-6-137. This Supplemental Petition for Violation of Probation, was based upon Mr. Randolph's arrest of February 16, 1978.

On December 19, 1979, Alphonso Randolph appeared before his Honor Judge Paul Gerrity, in the Circuit Court of Cook County, in Markham, Illinois, pursuant to proceedings to violate the probation imposed under 75 I-6-137. A motion was then made by Mr. Randolph, to terminate said proceedings, in that Mr. Randolph's probation had expired as matter of law on June 15, 1979, and as such the court lacked jurisdiction over the probationer. After said motion was heard and denied, a hearing to determine whether or not Mr. Randolph had violated the probation imposed on 75 I-6-137 was held. At said hearing, testimony was heard from Officer Randall E. Wolfe, Joseph Underwood, Alvin C. Edwards, Arthur James, Officer Douglas Newton, Kevin Kelly, and Alphonso Randolph. The testimony of Officer Wolfe, Underwood, James, and

Edwards, was substantially as summarized above. Kevin Kelly testified that he was present at the premises located at 15019 Artesian, Markham, Illinois, on February 16, 1978, during the afternoon hours, and did not see Alphonso Randolph at anytime that date.

Alphonso Randolph testified among other things that on December 31, 1975, he was visiting his sister, and had walked across the street to a Texaco gas station to buy a pop and make a phone call, when he was arrested by a Dixmoor Police officer Hollaway, in connection with a recently attempted theft at Deel Ford. He further testified that on February 16, 1978, he had not been in or at the premises of 15019 N. Artesian, Markham, Illinois, but had just arrived as a passenger in a friends auto, when he was arrested by Officer Newton in the front of a said premises. At the conclusion of all evidence, the court found Mr. Randolph in violation of probation, ordered a presentence investigation, and continued the cause for sentencing to January 22, 1980.

On January 22, 1980, as a result of the Violation of Probation, Alphonso Randolph was sentenced to a period of 3 years in the Illinois Department of Correction. He was not given credit for time served on probation prior to the alleged violation. The speedy hearing and due process arguments were represented to the Illinois Appellate Court, First District, which rejected said contentions in affirming the trial court's judgment.

ARGUMENT AND REASONS FOR ALLOWING THE WRIT OF CERTIORARI

This case presents a substantial question of federal constitutional law pertaining to the question of the application of the Sixth Amendment right to a speedy trial to probation revocation proceedings. It also raises the issue of at what point, if any, an individual's Fourteenth Amendment guarantee of due process is violated by an extraordinary delay in the filing and hearing of a probation revocation petition.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778, 36 L. Ed. 2d 656 (1973) this Court held that a probationer prior to revocation is entitled to a preliminary hearing to determine whether there is probable cause to believe that he has violated probation. He is also entitled to a final hearing which must include at a minimum:

> Written notice of claimed violations; disclosure of evidence against him; opportunity to be heard and present witnesses; right to confront and cross-examine witnesses; neutral and detached hearing body; and written statement of evidence relied on for revoking probation.

In *United States* v. *Marion*, 404 U.S. 307, 30 L. Ed. 2d 468 (1971), the Supreme Court noted that the Due Process Clause may require dismissal of an indictment if it were shown at trial that pre-indictment delay caused substantial, actual prejudice to the defendant. In *Dillingham* v. *United States*, 423 U.S. 64, 46 L. Ed. 2d 205 (1975), the Court extended its prior holding by ruling that the protection of the Sixth Amendment is activated when a criminal prosecution has begun. At the point of defendant's arrest, the speedy trial provision went into effect.

In the instant cause, the petition was brought before the Circuit Court of Cook County, Illinois on April 27, 1976. While the State indicated a desire to file a Petition for Violation of Probation, there is no indication on the face of that document that said petition was ever filed. (Tr. 234) In addition the "Memorandum of Orders" does not indicate the filing of any such petition. (Tr. 222-223)

On November 13, 1979—43 months later—the State filed what it euphemistically referred to as a "Supplemental Petition For Violation of Probation." A hearing on said Petition was held on December 19, 1979 at which time petitioner's probation was revoked. This all occurred despite the fact that petitioner's four year probationary term ended on June 18, 1979—prior to the filing of the "Supplemental Petition" and the subsequent hearing.

The Illinois Appellate Court Opinion acknowledges that "unless probation had been tolled or revocation proceedings had begun by June 18, 1979, defendant's probationary term expired and the court was prevented from entertaining a revocation hearing thereafter." (Appellate Court Opinion, page 4) The Court accepted the State's claim that probation had been tolled by the filing of a revocation petition on April 27, 1976. This is despite the fact that both the Appellate Court and the State concede that the common law record reveals that no such petition was filed on that date and in fact, that the State waited 43 months until November, 1979 to file what it cryptically labelled a "supplemental" revocation petition.

In examining the record as a whole, it is clear that the State's contention that its petition was timely filed does not logically jibe with the facts of this case. From April 27, 1976—the date the State maintains it filed its Petition —until February 16, 1978, when the defendant was ar-

rested on an unrelated charge, the State took no action to prosecute or make any other disposition on a revocation petition. Mr. Randolph was at large in society and if, in fact, such a revocation petition actually existed, it is thoroughly unexplainable why the State took no action on said petition. The only logical answer for the State's lack of its usual diligence is that everyone operated under the assumption that no such revocation petition existed. Perhaps, as the report of proceedings appears to indicate, the State *intended* to file and prosecute such a petition but the subsequent case history reveals that no such action was ever taken.

The record thus clearly reveals that Mr. Randolph's term of probation was never tolled in accordance with the statutory requirements and, therefore, his four year probationary period expired on June 18, 1979. This was six months prior to the revocation hearing held on December 19, 1979 and five months prior to the filing of the State's revocation petition on November 13, 1979. Accordingly, it is evident that the appellant was beyond the court's jurisdiction when the revocation hearing was held, and that the Appellate Court's ruling to the contrary should be reviewed and, ultimately, reversed.

CONCLUSION

WHEREFORE, petitioner Alphonso Randolph respectfully asks that a writ of certiorari issue to the Appellate Court of Illinois, First Judicial District, to review the judgment in *People* v. *Randolph*, No. 80-240, and that upon review by this court that the finding of violation of probation and the subsequent sentence imposed as a result thereof be reversed.

Respectfully submitted,

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